Murphy, J. (1)

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CHARLES ELMORE CROPLEY

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 310

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, et al.,

Petitioners,

vs.

SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.....

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA, and THE STATE OF FLORIDA, et al.,

Petitioners,

vs.

SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT, and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Petitioners, Trustees of the Internal Improvement Fund of the State of Florida, a State Agency, the State of Florida, a sovereign State, J. M. Lee as Comptroller of the State of Florida and J. Edwin Larson as Treasurer

of the State of Florida; Anthony Schleman, as Tax Collector and Chas. H. Pent, as Clerk of the Circuit Court of Hillsborough County, tax collecting officials of the State of Florida, and County of Hillsborough, pray that a Writ of Certiorari issue to review the decree of the Circuit Court of Appeals for the Fifth Circuit, entered May 8, 1944, affirming the decrees of the District Court of the United States for the Southern District of Florida, entered April 27, 1942, August 15, 1942, and September 18, 1942.

I.

SUMMARY AND SHORT STATEMENT.

This is an action in eminent domain brought by the United States for the purpose of taking title in fee simple absolute to certain lands in Hillsborough County, Florida, for an Army Air Base. Petition for condemnation, and declaration of taking were filed in the District Court and deposit was made into the Registry of said Court in the latter part of 1939. The proceedings were had in conformity with the Act of Congress approved February 26, 1931, Chapter 707, paragraph 1, 46 Stat. 1421, 40 U.S.C.A. 258(a). The amount of compensation was determined by a verdict of a jury rendered January 23, 1942, and a judgment entered thereon on May 29, 1942, (R-101).

No objection was made, nor is now raised, to the taking of the property by the United States or to the compensation paid therefor. The State of Florida and the Trustees of the Internal Improvement Fund, an agency of the State of Florida, and Hillsborough County objected to the orders of the Federal District Court fixing the priority of

payment of tax liens and ordering disbursement of the funds paid into Court for compensation for the taking of said lands, as will be more fully set out hereinafter.

A portion of the lands condemned lay within the boundaries of Southwest Tampa Storm Sewer Drainage District, established under the name of Interbay Drainage District (its name being changed in 1927 by Amendatory Decree). The District was created under and pursuant to the General Drainage Laws of the State, Chapter 6458, Laws of Florida, Acts of 1913, and subsequently Sections 1098 to 1150 RGS 1920; Sections 1451 to 1507 CGL 1927; Sections 298.01 to 298.56, Florida Statutes 1941. Liens are claimed on said lands for unpaid installments of Drainage Assessments and maintenance tax.

The Reconstruction Finance Corporation claims to be the holder of the majority of the bonds of said Drainage District. Its rights are substantially co-extensive with the rights and claims of the Drainage District.

The State of Florida is a sovereign State, and the Trustees of the Internal Improvement Fund is an agency created under the Laws of the State of Florida, Chapter 610, Laws of Florida, Acts of 1855, Section 253.01, Florida Statutes 1941, and have power to sell tax forfeited lands under Chapter 18296, Laws of Florida 1937, Section 192.38, Florida Statutes 1941. The County of Hillsborough is a political subdivision of the State and is represented through its tax collecting officials.

Under Chapter 18296, Laws of Florida, Acts of 1937, lands in the State of Florida on which there were outstanding State and County tax certificates two years old at the

time of the passage of the act, and thereafter unredeemed, vested on June 9, 1939, in the State of Florida, free and clear of all liens, except those liens of equal dignity with State and County taxes.

Under the taxing laws of the State of Florida, liens for State and County taxes represented by tax certificates (not covered by Chapter 18296, supra), were sold to the State and the subsequent unpaid taxes were a lien on lands superior to all other liens (Chapter 10040, Acts of 1925, Chapter 14572, Acts of 1929, Chapter 17442, Acts of 1935, Section 192.21, Florida Statutes 1941).

The Drainage District, by its answer and amendment thereto (R-25 & 27), and petition for distribution (R-79), asserted liens in favor of the District for drainage assessments and taxes and right to payment and satisfaction thereof from the award.

The Reconstruction Finance Corporation, by answer (R-19), alleged its ownership of the bonds of the District and as the owner of the bonds claimed a lien against the land.

The State of Florida claimed taxes due the State and County (R-23), and the State and Trustees of the Internal Improvement Fund by Answer (R-42), claimed sums deposited in Court for the taking of "Murphy Lands", i e., lands forfeited to the State under Chapter 18296, supra. In reply to claim of Drainage District (R-63), the State urged that the lien of the Drainage District for annual installments was based on levy of total tax made pursuant to Section 1119 RGS 1920, as amended by Chapter 9129, Acts of 1923, and that the installment taxes levied pursuant

to such total tax levy were not of equal dignity with the lien of State and County taxes.

The State and County claimed the drainage taxes and assessments levied by said District were not of equal dignity with liens of taxes for State and County, except the maintenance taxes levied subsequent to effective date of Chapter 12040, Laws of Florida, Acts of 1927. Those maintenance taxes levied subsequent thereto were on a parity with the liens for State and County taxes. That where liens for taxes were claimed by the District and State and County, the liens of State and County taxes were entitled to be paid with interest thereon in full where priority was claimed, and on a proportionate basis where the liens were of equal dignity.

In reply filed by State of Florida and Trustees of the Internal Improvement Fund to amendment of answer of Drainage District (R-67), title to certain of the parcels was claimed to be vested in the State of Florida pursuant to Chapter 18296, supra, and by virtue of the lien of the State being superior to the drainage taxes or assessments the Trustees were entitled to be paid the full amount of the award for the taking of the lands, the lien of the Drainage District being eliminated on the vesting of title in the State, except as to maintenance taxes levied subsequent to effective date of Chapter 12040, Laws of Florida, Acts of 1927.

The District Court in its Order of April 27, 1942 (R-90), ordered that the lands vested in the State pursuant to Chapter 18296, Laws of Florida, Acts of 1937, were subject to and burdened with liens of unpaid drainage taxes

and assessments, and that proceeds for taking such lands should be applied first to payment of such liens and second, to the Trustees of the Internal Improvement Fund; also that where the State had no title and liens existed for unpaid State and County taxes and drainage taxes, such liens were of equal dignity and where compensation for taking of lands was inadequate to pay all such liens, that the liens were to be paid on a pro rata basis out of such funds.

On September 18, 1942, (R-116), the Court, by order, directed distribution of funds paid for lands, title to which was vested in the State of Florida. In so doing, the Court directed that amount found due for drainage taxes assessed prior to taking of title by the United States, be paid and residue paid to the Trustees of the Internal Improvement Fund.

By another Order of the same date (R-112), the Court ordered distribution of the compensation awarded for a portion of the lands which had not vested in the State but liens for taxes were claimed by the State and County and the Drainage District. The Court held that such liens were of equal dignity and on a parity, and where the amount of compensation was inadequate to pay all of such liens, the award should be pro rated without preference.

The issues made by the pleadings were and are as follows:

1. As to lands forfeited to the State under Chapter 18296, supra:

(a) The State through the Trustees of the Internal Im-

provement Fund, claimed title, free and clear of all liens (except drainage liens for maintenance levied subsequent to effective date of Chapter 12040, Laws of Florida, Acts of 1927). That Chapter 12040 not being intended to act retroactively, did not operate upon lien of assessment made prior thereto, and the annual installments being merely to fix maturity dates of the assessment.

(b) The Drainage District contended successfully that Chapter 12040, supra, acted to make all annual assessments and maintenance taxes levied prior and subsequent to effective date thereof, of equal dignity with liens for State and County taxes, and on vesting of title in the State such drainage liens remained on such parcels and were entitled to payment in full prior to distribution of any funds to the Trustees of the Internal Improvement Fund.

2. As to lands not claimed to be owned by the State.

(a) The State and County claimed that the lien represented by certificates for State and County taxes and subsequent omitted taxes, were superior to liens of drainage taxes (except liens for maintenance levied subsequent to effective date of Chapter 12040, supra), for the reason that Chapter 12040, supra, which purported to establish drainage liens as equal in dignity with State and County taxes, did not affect liens established by assessment of taxes, prior to the effective date of the act, and that annual assessment of taxes merely fixed the maturity dates of the lien, and the State and County liens were entitled to priority of payment.

(b) The Drainage District contended successfully, that Chapter 12040, supra, constituted their liens of equal dig-

nity with State and County liens, and that such District was entitled to share in the proceeds paid into Court on a pro rata basis.

3. The State and Trustees urged that the issues made by the claim of the State for the proceeds deposited into Court for the taking of tax forfeited lands (those lands vested in the State under Chapter 18296, Acts of 1937), and the claim of the Drainage District to be paid out of such proceeds a sum of money alleged to be due for the satisfaction of its liens for drainage taxes and assessments, constituted a suit by the Drainage District against the State of Florida, to which suit the State has never given its consent. That under Florida decisions the State could not be sued by the Drainage District to enforce the lien against such tax forfeited lands, and the claim of such liens as against the proceeds deposited in place of the lands constituted a suit against the State prohibited by the Constitution and Statutes of the State of Florida (Prince-Hall Masonic Building Association vs. City of Jacksonville, 149 Fla. 109, 6 So. 2d. 250).

After denial for Petition for Rehearing (R-104), the Trustees of the Internal Improvement Fund and others, entered their appeal to the Circuit Court of Appeals of the Fifth District, on October 26, 1942, and on the 8th day of May, A. D. 1944, said Court entered its judgment (Exhibit A) affirming the United States District Court of the Southern District of Florida, said opinion affirming the cause solely upon the merits.

II.

THE DECISION OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The opinion of the Circuit Court entered May 8, 1944, is not yet reported and for convenience is printed in an appendix to the brief filed with this petition, and therein market Exhibit A.

III.

BASIS OF JURISDICTION.

The Supreme Court of the United States has jurisdiction to review the decision of this cause of the United States Circuit Court of Appeals for the Fifth Circuit, under the provisions of Section 240 (a) of the Judicial Code of the United States, 28 U. S. C. A. 347 (a).

The opinion of the Circuit Court of Appeals for the Fifth Judicial Circuit was filed May 8, 1944, and this petition is presented and filed in the office of the Clerk of this Honorable Court within a time less than ninety days from the date upon which said opinion was filed.

IV.

QUESTIONS PRESENTED.

The fundamental questions presented in the petition are as follows:

(a) The Circuit Court of Appeals erred in holding in its opinion and judgment (Exhibit A) that the action of the Drainage District in making and prosecuting its claim for part of the proceeds deposited in Court as compensation for taking State owned lands and the order of the District Court directing distribution of such funds to pay such claims for taxes and assessments claimed by the said district, did not constitute a suit against the State.

(b) The Circuit Court of Appeals in and by its opinion and judgment (Exhibit A) erred in affirming order of lower Court of April 27, 1942, and subsequent orders, holding that title to tax forfeited lands vested in the State of Florida under Chapter 18296, Laws of Florida, Acts of 1937 (Murphy Act) was subject to and burdened with liens for unpaid drainage taxes, and that such taxes should be paid in full before the State of Florida received distribution of the award (R-133).

(c) The Circuit Court of Appeals erred in and by its opinion and judgment (Exhibit A) affirming order of the lower Court, dated April 27, 1942, and subsequent orders, holding that Drainage District taxes were of equal dignity with State and County taxes and neither was entitled to priority of payment over the other. (R-133).

(d) The Circuit Court of Appeals erred in and by its opinion and judgment (Exhibit A) affirming order of the District Court of April 27, 1942, and subsequent orders, holding that Section 2 of Chapter 12040, Acts of 1927 (Section 1472 CGL 1927), which provides that drainage liens shall be of equal dignity with liens for State and County taxes, changed the priority of drainage liens that were levied and assessed prior to the effective date thereof, when

such drainage liens were not of equal dignity with State and County taxes. (R-133).

(e) The Circuit Court of Appeals erred in and by its opinion and judgment (Exhibit A) affirming order of the District Court of April 27, 1942, and subsequent orders, holding that the acquisition of title by the State under Chapter 18296, supra, changed the dignity, status and interest of the State therein, in that, such State interest became inferior to lien of Drainage District by requiring payment of drainage taxes in full before distribution of any proceeds to the State. (R-134).

V.

REASON FOR GRANTING THE PETITION.

The Circuit Court of Appeals for the Fifth Circuit, in determining the manner and method of distributing funds deposited for taking of lands by eminent domain to the Drainage District for claims for drainage taxes and assessments, and to State and County for taxes, and the right of the Drainage District to be paid for drainage taxes and assessments out of the award for taking State owned lands, necessarily had to construe Statutes of the State of Florida authorizing Drainage Districts to assess drainage taxes upon lands; the effect of Chapter 12040, Laws of Florida, Acts of 1927, purporting to make such liens of equal dignity; to determine the priority of the various liens, together with the question of the liens that remain against State lands on vesting of a portion of the lands in the State under Chapter 18296, Laws of Florida, Acts of 1927. The

construction placed on such acts by the said Court is probably in conflict with applicable Florida law.

Section 9, Chapter 18296, Laws of Florida 1937, (Appendix B), and applicable portions of Florida laws relating to levy of taxes by the Drainage District and the State and County, to-wit:

Portion of Section 1114 RGS 1920, Appendix C.

Portion of Section 1115, as amended by Chapter 9129, Laws of Florida 1923, Appendix D.

Portion of Section 1119 RGS 1920, Appendix E.

Portion of Chapter 12040, Laws of Florida, Laws of 1927, Appendix F.

Portion of Section 696 RGS 1927, Appendix G.

Portion of Chapter 10040, Laws of Florida, Acts of 1925, re-enacted by Chapter 14572, and Section 2 of Chapter 17442, Acts of 1929 and 1935, Appendix H are in the order above stated, attached to the appendix of the brief attached to this petition.

That said Circuit Court of Appeals, in determining that the action of the Drainage District in filing claim for drainage taxes and assessments and claiming right to be paid therefor out of funds deposited for the taking of State owned lands, and in determining that the orders of the Court ordering payment of such claims out of such funds did not constitute a suit against the State of Florida, rendered a decision upon a Federal and State Constitutional question that is of gravity and general importance, such decision being in conflict with applicable Florida and Federal law.

That Section 22, Article III of the Constitution of the State of Florida provides:

> "Provision may be made by general law for bringing suit against the State as to all liabilities now existing or hereafter originating."

In the case of Prince-Hall Masonic Building Association vs. City of Jacksonville, 6 So. 2d. 250, decided December 16, 1941, the Supreme Court of the State of Florida stated that the State might not be joined in a suit to enforce liens against State lands forfeited to the State under Chapter 18296, supra.

Eminent Domain proceedings although bought in the Federal Courts conform to the practice and pleadings of the State within which such action is brought. (Mar. 3, 1911, C231, No. 291, 36 Stat. 1167, 40 USCA Section 258.) The claim against such State lands being unenforceable as a suit against the State, the claim against the proceeds deposited into Court for the taking of such lands is a suit against the State, as such proceeds stand in place of the lands and only those rights *enforceable* against the lands are enforceable against the proceeds.

Thus the decisions below apparently are contrary to the local law and the applicable decisions of this Honorable Court, and the determination of those questions by this Court will settle the questions and make for uniformity.

WHEREFORE it is respectfully submitted that this petition for Writ of Certiorari to review judgment of the Circuit Court of Appeals for the Fifth Judicial Circuit be granted.

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vs.

SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT, and RECONSTRUCTION FINANCE CORPORATION,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

I.

THE OPINION

The petitioner herein by a petition for a Writ of Certiorari seeks a review of a judgment and opinion of the United States Circuit Court of Appeals for the Fifth Judicial Circuit, which judgment and opinion is found in the record, pages 150 to 155; copy of the opinion is attached to the Appendix attached to this brief as "Exhibit A". The said judgment and opinion is an affirmance of judgments and opinions of the United States District Court for the Southern District of Florida in this cause, which are set out in the record at pages 90 to 93; 104; 112 to 115, and 115 to 127, and are not reported.

II.

STATEMENT OF GROUNDS UPON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOLVED.

This statement is set out in the preceding petition under III, which is hereby adopted and made a part of this brief by reference.

III.

STATEMENT OF THE CASE.

A concise statement of the case containing all that is material to the consideration of the questions presented, is set out in the preceding Petition under I, which is hereby adopted and made a part of this brief by reference.

IV.

SPECIFICATION OF ERROR INTENDED TO BE URGED.

This specification is set out in the preceding petition under IV, which is hereby adopted and made a part of this brief by reference.

V.

ARGUMENT.

Summary of Argument.

Point 1. In a condemnation suit brought by the United States of America to condemn State lands, the prosecution in such suit of a claim by the drainage district for the satisfaction of a drainage tax lien upon such State lands, and the payment of such tax lien out of the funds deposited in Court for the taking of said lands, constitutes an unauthorized suit by the drainage district against the Sovereign State of Florida.

Point 2. The lien of the drainage district for its assessments was inferior and subject to the lien of the State for State and County taxes and such drainage liens were extinguished when the fee simple title to the lands in question vested in the State under the provisions of the Murphy Act.

Point 3. The lien of the drainage district for its assessments against lands is inferior to the lien held by the State of Florida for State and County taxes levied against the same lands.

Point 1.

In a condemnation suit brought by the United States of America to condemn State lands, the prosecution in such suit of a claim by the drainage district for the satisfaction of a drainage tax lien upon such State lands, and the payment of such tax lien out of the funds deposited in Court for the taking of said lands, constitutes an unauthorized suit by the drainage district against the Sovereign State of Florida.

Suit against the state, want of jurisdiction.—Before considering the case upon its merits, we wish to suggest want of jurisdiction, in the district court and in the United States Circuit Court of Appeals, Fifth Circuit, to entertain and adjudicate the issues made by and between the claim of the State of Florida and the claim of the drainage district, as to the Murphy act lands. The state has, in no way, given its consent to such proceeding; and in effect made objection thereto in the district court (see paragraph f. g. h. k. m. and n, of petition for rehearing, pages 95, 96 and 97 of transcript). "It is a settled rule that a sovereign state cannot be sued without its consent. This is true whether the issue is raised by direct suit or otherwise" (Danford vs United States, 102 Fed 2nd. 5, text 8, citing Nassau Smelting & Refining Works vs. U. S., 266 U. S. 1, 107, 45 S. Ct. 25, 69 L. Ed. 190; Illinois Central R. Co. vs. Public Utilities Comm., 245 U. S. 493, 38 S. Ct. 170, 62 L. Ed. 425; Davis vs. O'Hara, 266 U. S. 314, 45 S. Ct. 104, 69 L. Ed. 303; Bigby vs. U. S. 188 U. S. 400, 401, 23 S. Ct. 468, 47 L. Ed. 519; North Dakota-Montana W. G. Ass'n. vs. United States, 66 Fed. 2nd. 573, 92 A. L. R. 1484). The above case of Danford vs. United States

was appealed to the United States Supreme Court, however the above principle of law therein enumerated was not disturbed on appeal (308 U. S. 271, 60 S. Ct. 231, 84 L. Ed. 240). "A sovereign may not be sued without its consent even in cases arising under the laws of the United States" (Cooper vs. Westchester County, 39 Fed. Sup. 58, citing Cargile vs. New York Trust Co., 67 Fed. 2nd. 585, in which certiorari was denied in 292 U. S. 625, 54 S. Ct. 630, 79 L. Ed. 148). "Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void. The failure of officials to seek review cannot give force to this exercise of judicial power. Public policy forbids the suit unless consent is given, as clearly as public policy makes jurisdiction exclusive by declaration of the legislative body" (United States vs. U. S. Fidelity & Guaranty Company, 309 U. S. 506, 84 L. Ed. 895, text 899). "The immunity of the state from suit can only be waived by the legislature, and it is in no manner bound or estopped by the acts of its officers" (Title Guaranty & Surety Company vs. Guernsey, 205 Fed. 74; in this case a cross bill had been filed against the state and the attorney general had filed an answer and interpleaded).

Proceeding on claims a suit.—In this proceeding the state, pursuant to process issued out of the district court, filed its claim for the compensation paid or to be paid for the taking of its Murphy act lands within the area condemned (tr. 42-55); and the drainage district, pursuant to like process issued, filed its claim for drainage taxes claimed against the same lands (tr. 25-42, 57-62). Replies to such claims were filed by the respective parties (tr. 67-72, 74-76). As appears from the record in this cause,

numerous issues were raised by the pleadings which must be determined by the court if the claims between the parties are to be settled. The state was the owner of the lands and has claimed the proceeds or compensation substituted for the lands taken; the drainage district has filed claims based upon liens against this fund and to that extent is prosecuting a demand against the state in a court of justice. The drainage liens existing against the Murphy act lands taken could not have been enforced had the title to such lands remained in the state (Prince-Hall Masonic Building Association vs. City of Jacksonville, 149 Fla. 109, 6 So. 2nd. 250). Under the laws of this state, the state may not be sued except by consent given by its legislature (Prince-Hall Masonic Building Association vs. City of Jacksonville, supra; Southern Drainage District vs. State, 93 Fla. 673, 112 So. 561; Hampton vs. State Board of Education, 90 Fla. 88, 105 So. 323, 42 A. L. R. 1456). The proceedings between the state and the drainage district, in the condemnation suit, is in the nature of cross or counterclaims between two defendants to the original proceeding; the proceeding to be a suit against the state need not be a direct proceeding but may be in the nature of a counterclaim (United States vs. U. S. Fidelity & Guaranty Company, 309 U. S. 506, 84 L. Ed. 895), cross bill (Title Guaranty & Surety Company vs Guernsey, 205 Fed. 74) or the prosecution, or pursuit, of some claim, demand or request (Missouri vs. Fiske, 290 U. S. 21, 78 L. Ed. 145). In the last cited case (L. Ed. text 150) the Supreme Court said:

> "The proceeding by ancillary and supplemental bill to restrain the State from this exercise of authority is unquestionably a 'suit.' Said Chief Justice

Marshall in Cohen v. Virginia, 6 Wheat. 264, 407, 408, 5 L. Ed. 257, 291, 282, '*What is a suit? We understand it to be the prosecution, or pursuit, of some claim, demand, or request. In law language, it is the prosecution of some demand in a Court of justice* . . . To commence a suit is to demand something by the institution of process in a Court of justice; and to prosecute the suit, is, according to the common acceptation of language, to continue that demand. * * * " (Italics ours).

Award substituted for land taken.—"Where land is taken for a public use, the damages awarded take the place of the land with respect to all rights and interests dependent on and incident to it, and the owners of the property condemned have the same interest in the fund they had in the land taken" (29 C. J. S. 1102, section 196); the award is "subject to all liens which have attached to the several parcels at the time of the entry of the decree of condemnation. The lien status is not changed by the taking of the land by the inherent right in society" (U. S. vs. Certain Parcels of Land in the City of San Diego, 44 Fed. Sup. 937). "As a general rule the holder of a judgment lien or a tax lien on lands taken for the public use has no such interest therein as entitles him to be made a party to the condemnation proceeding or to recover compensation from the condemnor" (29 C. J. S. 1108, section 200), although under proper circumstances the court "may allow the condemnor to pay the award into court for the benefit of the owner and the lienholders, although the lienholders were not made parties to the condemnation proceedings" (29 C. J. S. 1108, section 200). The award in such case is a substitute for the land taken and the lien

is transferred to the award (Dye vs. Schick, 74 Ind. App. 459, 129 N. E. 242). The status of the claims filed as charges or liens against the property taken is to be determined by the law of the state wherein the land taken lies (United States vs. Certain Parcels of Land in San Diego, 44 Fed. Sup. 937; United States vs. Certain Parcels of Land in Prince George's County, 40 Fed. Sup. 436). The federal courts in adjudicating the claim of the drainage district, against the award paid into court for the taking of the Murphy act lands of the state, in legal effect are entertaining a suit for the purpose of fixing a lien against state property which it could not have done had the actual title to the lands remained in the state; the award having been substituted for the lands the title to such award is, for all intents and purposes, in the State of Florida. The claim of the drainage district may not be enforced against the award to any greater extent than it could have been enforced against the lands in the hands of the state. The practice of authorizing the payment of an award in condemnation without providing for the payment of unenforceable tax liens is not novel (Johnson, Collector vs. Revere Building, Inc.,.....Mass....., 177 N. E. 577, 79 A. L. R. 112).

We, therefore, submit that the award paid into court as compensation for the taking of the Murphy act lands in question stands in lieu of the title to the lands taken; that title to such fund is, for all intents and purposes if not actually, in the state; that the district court, when it entertained the proceeding by the drainage district to fix a lien against such award, in legal effect entertained a suit against the state in violation of the 11th amendment to the United States Constitution and of the laws of the

United States and of the State of Florida; and that the award, belonging to the state, should have been paid to the state without regard to the liens and claims against it. The cause should be reversed and the proceedings on the said claims dismissed.

Point 2.

The lien of the drainage district for its assessments was inferior and subject to the lien of the State for State and County taxes and such drainage liens were extinguished when the fee simple title to the lands in question vested in the State under the provisions of the Murphy Act.

The stated proposition relates to liens that may be divided into three classes, to-wit:

1. Liens for state and county taxes existing when the drainage district was formed in 1923;

2. Liens for such taxes assessed and becoming delinquent between the formation of the drainage district and the enactment of the parity act in 1927; and,

3. Liens for such taxes assessed and becoming delinquent subsequent to the effective date of the parity act.

Tax liens existing when district formed.—Let us here consider the first class, last above mentioned, of tax liens, under which tracts numbered 46, 47, 48, 49, 50, 51 and 52 (tr. 43-54), as well as tracts 85B, 87, 108, 109, 112, 114 and 119 (tr. 117-126), became vested in the state pursuant to the said Murphy act. These tax liens were clearly within

the purview of the decision of the Supreme Court of Florida in the case of Sugar Bowl Drainage District vs. Miller, 120 Fla. 436, 162 So. 707. In this case a proceeding had been brought for the purpose of foreclosing "a tax certificate issued August 4, 1919, for the nonpayment of state and county taxes of 1918." The certificates involved in the proceeding were issued prior to the formation of the Sugar Bowl Drainage District. The court (162 So. text 707) stated the following question argued by counsel in that case,

> The first question argued here is whether or not a lien for state and county taxes levied before the formation of the drainage district is superior to the lien for drainage taxes made subsequently against the same lands.

and reached the following conclusion:

> Sugar Bowl Drainage District was incorporated under Chapter 6458, Laws of Florida, Acts 1913, and was amended by Chapter 8902, Sp. Acts 1921. The certificate involved in this litigation accrued in 1919 was prior in time and dignity to accruals for drainage taxes and was not affected by section 1472, Compiled General Laws of 1927. (1927 Parity Act).
>
> The fact that bonds are outstanding against the district in no way militates against this view. The bondholders purchased with knowledge of the law affecting them and may protect themselves by paying the taxes or redeeming the lands at any time before the expiration of the period of redemption. State v. Board of Commissioners of Cascade County, 89 Mont. 37, 296 P. 1.

It is next contended that when Sugar Bowl Drainage District foreclosed and took its master's deed for nonpayment of drainage taxes, the fee to the lands was merged in the title so secured.

Merger has reference to the absorption or extinguishment of one estate or contract into another, generally a lesser estate or right into a greater. A tax lien is said to merge in the ownership of the fee when the state becomes the absolute owner. State v. Locke, 29 N. M. 148, 219 P. 790, 30 A. L. R. 407. But a drainage district can no more acquire the unincumbered fee by foreclosing its drainage tax lien than a mortgagee can do so by foreclosing his mortgage. If appellant's contention be true, then it can acquire title to the lands in the drainage district and relieve them of all other forms of taxation.

Sections 694 and 697, Revised General Statutes of 1920, and sections 893 and 897, Compiled General Laws of 1927, define the classes of property that are subject to and exempt from taxation in this state and the exemptions do not cover lands owned by drainage districts. It is admitted that the lands in question are not used for public purposes.

The decision of the state court upon this question is binding upon this court, as the entire question was one of construction of state statutes (West vs. American Telephone and Telegraph Company, 311 U. S. 223, 61 Sup. Ct. 179, 85 L. Ed. 139, 132 A. L. R. 956 and annotation; Erie Railroad Company vs. Tompkins, 304 U. S. 64, 58 Sup. Ct. 817, 82 L. Ed. 1188, 114 A. L. R. 1487). The case should

be reversed for the purpose of correcting the error made by the district court in its failure to follow the state court's decision, which was binding on it.

Tax liens accruing after formation of district.—We will next consider the second and third classes of tax liens. These include taxes levied and tax sale certificates issued subsequent to the formation of the drainage district and prior to the enactment of the parity act of 1927; and those taxes levied and tax sale certificates issued subsequent to the enactment of the parity act of 1927. The priority between the liens of the drainage assessments and of these two classes of tax liens may depend upon the nature and time of attachment of the drainage assessment lien.

Attachment of drainage liens.—Prior to the adoption of chapter 12040, laws of Florida, acts of 1927, the general drainage statutes, under which the drainage district in question was organized, provided that "all drainage taxes . . . shall, from the date of the assessment thereof until paid, constitute a lien, to which only the lien of the state for general state, county school and road taxes shall be paramount" (section 1, chapter 9129, acts 1923). Chapter 12040 amended the above law so as to provide that such assessment "shall, from the date of the assessment thereof until paid, constitute a lien of equal dignity with the lien for state and county taxes, and other taxes of equal dignity with state and county taxes" (section 2, chapter 12040, acts 1927). The liens under the two acts, although different in priority with state and county taxes, are made to attach "*from the date of the assessment*" of the drainage taxes and continue until such taxes are paid. This requires a determination of the date of the assessment of

the drainage tax; which in turn suggests the following question:

> Did the lien of the assessment for drainage, made by the drainage district, attach when the total assessment was levied in 1924 and 1926, or does it attach annually when the annual installments of the total assessment are placed upon the tax rolls?

This question must be determined from the construction of the general drainage laws in force when the district was formed and the total assessment was made, with subsequent statutes and laws applicable.

The statutes in force when the district was formed, provided that, as soon as the benefits were assessed (section 1110, R. G. S.), the report of such assessment was made and notice thereof given (section 1111, R. G. S.), objections to such report were considered and ruled on by the court (section 1112, R. G. S.) and the "lists of the lands, with assessed benefits and the decree or judgment of the court, have been filed in the office of the clerk of the circuit court, ... the board of supervisors shall, without any unnecessary delay, levy a tax of such portion of said benefits on all lands, in the district to which benefits have been assessed, as may be found necessary . . . . to pay the cost of the completion of the proposed works and improvements . . . . " (section 1114, R. G. S., appendix "B").

As soon as the tax mentioned in section 1114, above, was levied, the secretary of the board of supervisors was required to prepare a list of all the assessments levied, as provided in section 1114, in the form of a well bound book, which is a permanent record in the office of the secre-

tary of the district (section 1114, R. G. S.). After the levying of the assessment, the board of supervisors, each year thereafter, levies the annual installments "of the total taxes levied under the preceding section" (i. e. section 1114, R. G. S.), which annual tax becomes due and collectible at the same time as do state and county taxes. This annual installment of taxes is required to be evidenced by a certificate of the secretary, which certificate is set out in full by the statute (section 1115, R. G. S., appendix "C"); in this certificate reference is made to "the total tax levied under the provisions of section 1114," and the delivery of a certificate, as to said total tax, to the clerk of the circuit court. Section 1119, R. G. S., as amended by chapter 9129, laws of Florida, acts of 1923, provided for the lien of the drainage assessment, and made such lien effective *from the date of the assessment.* In connection with this lien, section 1119, R. G. S., provides the form of certificate to be filed with the clerk of the circuit court. This certificate is set out in chapter 9129, laws of Florida, acts of 1923 (which chapter amended section 1119, R. G. S.), see appendix "D" of this brief. This certificate provides a table showing the "amount of said taxes levied on each tract of land" and recites that the assessment in question "shall be payable in annual installments." This shows an intent to make one total assessment which is payable in installments; and not to make annual assessments.

The assessment record, delivered by the district to the tax assessor annually, is designated as the "drainage tax book" (sections 1115 and 1120, R. G. S.), while the one delivered by the district to the clerk of the circuit court which is delivered only once and not annually, is designated as the "drainage tax record" (section 1119, R. G. S.). The "drainage tax book" is for the purpose of making

collection of the annual installments and not for the purpose of giving notice; while the "drainage tax record" is a permanent record and notice of the lien on the lands. Section 1146, R. G. S., as amended by chapter 9129, laws of Florida, acts of 1923, provides that any person owning lands assessed for drainage taxes under the general drainage laws "shall have the right and privilege of paying such tax assessment" and that "when such tax assessment has been paid" the "drainage tax record" shall be marked "paid in full" after which "such tax assessment shall be deemed satisfied." This statute likewise seems to consider the total assessment as the assesment, and the annual installments as installments of that assessment. The Supreme Court of this state has said that the drainage taxes are "collected in annual installments, each installment being a portion of the total tax levy" (Certain Lands in Putnam County vs. East Palatka Drainage District, 111 Fla. 795, text 796, 149 So. 766; Hallifax Drainage District vs. State, 134 Fla. 471, 185 So. 123, text 127).

The Florida statutes differ from the Missouri statutes mentioned in the case of McAnally vs. Little River Drainage District, 325 Mo. 348, 28 S. W. 2nd. 650, in that the Florida statute provides for a lien "from the date of the assessment" while the Missouri statute provides for a lien "from the date of the filing ~~of the~~ certificate" in the office of the recorder of deeds (Sec. 4399, Rev. St. Mo.).

We, therefore, submit that there is one total assessment of the drainage tax, which is payable either in full or by installments. There is no separate assessment each year in which the annual installment is payable. The total assessment fixes the lien and not the annual installment.

Effect of parity act.—The lien of the assessment being fixed by the total assessment made prior to the effective date of the parity act, the following further question seems applicable,

> If the lien attached as an entire assessment in 1924 and 1926, what was the effect of the parity act of 1927 upon it, if any?

The Supreme Court of Florida has held that a statute is not to be given a retrospective effect unless its terms clearly show that such effect was intended (McCarthy vs. Havis, 23 Fla. 508, 2 So. 819; In re Seven Barrels of Wine, 79 Fla. 1, 83 So. 627; Cragin vs. Ocean, etc., Realty Company, 101 Fla. 1337, 135 So. 795; State vs. Cone, 140 Fla. 1, 191 So. 50). Statutes making tax liens paramount, in the absence of apt words expressing such intention, will not be construed retrospectively (71 C. J. 927, section 1178). There was no language in the parity act (chapter 12040, laws of Florida, acts of 1927) which admits of a retrospective construction for the operation of the act.

We, therefore, submit that, the lien of the total assessment of the drainage tax having attached in 1924 and 1926, the parity act of 1927 had no effect on it and did not raise the priority of such lien to a parity with state and county taxes. The lien remained an inferior lien to state and county taxes.

Subsequent tax priority laws.—Although it seems that the 1927 parity act had no effect upon the status of the lien of the drainage assessments and that they remained an inferior lien to state and county taxes; however, if we should, for the purpose of this argument, admit that the

1927 parity act affected a change in existing drainage assessments, it would then seem that section 1, chapter 14572, laws of Florida, acts of 1929 (also section 2, chapter 17442, laws of Florida, acts of 1935) would be in conflict with such parity act (they all being general laws), in that they provide that:

> All taxes imposed pursuant to the constitution and laws of this state *shall be a first lien superior to all other liens* on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment (underscoring ours).

If the drainage lien is to be of equal dignity with the lien of taxes imposed by the constitution and laws of the state, then the lien for state and county taxes (provided for in the 1929 and 1935 acts) is not *superior to all other liens* upon the property assessed, because the drainage lien is another lien. It is impossible to harmonize a statute providing that taxes imposed pursuant to the constitution and laws of this state shall be *superior to all other liens* with a statute providing that drainage tax liens shall be of equal dignity with liens of state and county taxes. Drainage taxes are not taxes imposed pursuant to the constitution and laws of this state (Allison Realty Co. v. Graves Investment Co., 115 Fla. 48, 155 So. 745, text 750; Lainhart v. Catts, 73 Fla. 735, 75 So. 47, text 52) within the meaning of the above acts of 1929 and 1935. Special assessments for drainage benefits is a peculiar species of taxation distinct from the general burden imposed for state, county and municipal purposes (Lainhart v. Catts, supra).

We, therefore, submit that the parity act of 1927 was in conflict with the provisions of the 1929 and 1935 acts, making taxes imposed pursuant to the constitution and laws of this state first liens superior to all other liens, and was repealed by them as to such parity provision.

In conclusion, as to the second question, the lien of the drainage district for its assessments being inferior and subject to the lien of the state for state and county taxes such drainage liens were superseded by the state's title when it became absolute under the Murphy act.

Point 3.

The lien of the drainage district for its assessments against lands is inferior to the lien held by the State of Florida for State and County taxes levied against the same lands.

It has been shown, under the discussion of the preceding question, that the lien for state and county taxes is prior and superior to the lien of the drainage district for its assessments made in 1924 and 1926; this being true the current liens for state and county taxes are prior and superior to the said lien for drainage assessments.

Carlile vs. Melbourne-Tillman Drainage District, 143 Fla. 355, 196 So. 687; it may be contended by the respondents that this case is authority for their contention that the liens of drainage district assessments and state and county taxes are equal in dignity. Nowhere in the opinion does it appear when the state and county tax sale certificates were issued, whether before or after the establish-

ment of the drainage district, or before or after the enactment of the parity act; neither does it appear when the drainage district was established, whether before or after the enactment of the parity act of 1927, or whether it was established under the general laws or by special act.

The only holding in this case is that, on authority of Bice vs. City of Haines City, 142 Fla. 371, 195 So. 919, drainage liens were not discharged by the Murphy act. It is, therefore, necessary that we turn to the Bice case to determine the scope of the holding in this case. In the Bice case (195 So. text 925) the court said:

> It seems clear that as State and municipal tax liens are of equal dignity and as no tax liens and unpaid taxes of a municipality are included in a State tax sale certificate, and as municipal tax sale certificates or tax liens or unpaid taxes were not authorized to be sold under the Murphy Act, municipal tax sale certificates and tax liens legally existing upon the lands covered by the State tax sale certificates were not intended to be affected, and were not affected by the vesting of the title to the lands in the State without the right of redemption, by section 9 of Chapter 18296, *which Act does not terminate, cancel or annul municipal tax sale certificates or other evidences of municipal tax liens that are of equal dignity with State tax liens.* (Italics supplied).

It is evident, when the opinion in the Melbourne-Tillman case is read in connection with the Bice case, that the court *assumed*, without deciding the question of priority of liens, that the lien for drainage taxes, in the Melbourne-

Tillman case, was of equal dignity with the lien for state and county taxes. It is evident that, unless the drainage lien is of equal dignity with the state lien, it was eliminated by the vesture of title in the state under the Murphy act. This conclusion is further supported by the case of Sugar Bowl Drainage District vs. Miller, 120 Fla. 436, 162 So. 707, where it was held that state tax liens accruing before the formation of a drainage district were superior to such drainage district liens.

We, therefore, submit that the Supreme Court of Florida in the Melbourne-Tillman case, did not decide the question of the priority of liens contrary to the position of your petitioners in this cause.

Respectfully submitted,

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WOODROW MELVIN

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APPENDIX

Exhibit A

Before SIBLEY, McCORD and WALLER,

Circuit Judges.

WALLER, Circuit Judge: In the fall of 1939 the United States took, by condemnation, the fee simple title to 5767 acres located within the confines of the Southwest Tampa Storm Sewer Drainage District (hereinafter referred to as "the Drainage District") for use as an Army Air Base. In due course a jury determined the amount of just compensation and the sum was deposited with the Court. The fee simple title to some of the lands had been forfeited to the Trustees of the Internal Improvement Fund of the State of Florida (hereinafter referred to as "the Trustees") under the so-called "Murphy Act" (Sec. 9 of Chapter 18296, Laws of Florida, 1937), for non-payment of state and county taxes. There was a large accumulation of delinquent drainage taxes on all of the lands involved. The award in compensation was less than the amount of the delinquent drainage taxes. Bonds issued by the Drainage District were largely in default, the largest holder of which was the Reconstruction Finance Corporation which had bought same with the purpose of aiding the Drainage District in its financial rehabilitation. The State claimed the full amount of the award for all lands to which it owned the fee simple title. There was also a controversy between the State and the District, or its bondholders, as to how the award should be distributed in the payment of the taxes due State, County, and Drainage District on lands

which had not been forfeited to the State under the Murphy Act. The record title holder, or the party who owned the lands prior to the loss of his title by the Murphy Act has faded from the scene. The award was insufficient to discharge the lien of all accumulated taxes.

The chief issue arises out of the conflict between the State, represented by the Trustees of the Internal Improvement Fund, as the fee simple owner of the title to those lands acquired under the Murphy Act, and the District, or its bondholders, over the question as to whether or not the State is entitled to receive the award, or any part thereof, or whether or not the title of the State is subject to liens for delinquent drainage taxes due the District.

Prior to 1927 the lien for taxes of the State and County was superior to the lien of the Drainage District, but the Legislature, by the enactment of Sec. 2 of Chapter 12040, Acts of 1927, made drainage taxes of equal dignity with state and county taxes.

The Supreme Court of Florida held in Prince Hall Masonic Building Association vs. City of Jacksonville, 149 Fla. 109, 6 So. 2d 250, that the tax liens of the State which were more than two years old on June 9, 1937, merged into the State's legal title under the Murphy Act. (See opinion on rehearing, 6 So. 2d 255). Therefore, the State had no tax liens on the lands which it acquired under the Murphy Act. That Court also held, in Carlile vs. Melbourne-Tillman Drainage District, 143 Fla. 335, 196 So. 687, that the title to land in a drainage district acquired under the Murphy Act went to the State, subject to, and burdened with, the lien of drainage district taxes, citing as authority Bice vs. Haines City, 195 So. 919. See also Baldwin Drain-

age District, a corporation, vs. Macclenny Turpentine Company, decided April 4, 1944, but not yet officially reported. It was also held in Prince Hall Masonic Building Association vs. City of Jacksonville, supra, that although the lien of a municipality under its tax certificates was not lost when the lands covered by such certificates were taken by the State under the Murphy Act, nevertheless the municipality could not enforce its lien against the State in the absence of specific authority from the Legislature to do so. The State could not be sued without its consent.

The foregoing cases reveal that: (1) the State has the legal title to lands which it acquired on delinquent and unredeemed certificates which were more than two years old on June 9, 1937; (2) that the lien of the State under such delinquent tax certificates merged into the State's fee simple title to such lands; and (3) that the lien of the District for drainage taxes on such lands remained outstanding but unenforcible so long as the lands were owned by the State.

Since the lien of the State for delinquent taxes on lands acquired under the Murphy Act has merged into the legal title, the State no longer has any lien for taxes on such lands, and, therefore, having no lien, it can have neither priority nor parity in liens for such taxes. The drainage taxes remain outstanding, even if unenforcible, despite State ownership.

We are not confronted with an effort on the part of the District to foreclose its drainage taxes. We are called upon to determine whether or not the award must be applied to the satisfaction of the tax liens of the District to the end that the United States may have a title free

and clear of all liens and encumbrances, which it has a right to acquire through the condemnation proceedings. Under the decisions of the Florida Supreme Court, which are binding on us, the drainage taxes remained a lien, but the tax liens of the State, having merged into its legal title, were no longer a lien or an encumbrance on the title of the United States. Paradoxical as it may seem, the State by becoming the owner of the greater estate, to-wit, the fee simple title in said lands, became the holder of a diminished right in this case. It became the owner of the title subject to tax liens of the District which were much in excess of the value of the lands. By the acquisition of the fee simple title it lost its liens, and the lien of the Drainage District became the first lien. The United States is entitled to have that lien satisfied out of the award in compensation. If it should seem unusual or unjust that the State (whose rights are generally prior, or at least equal, to those of its political subdivisions) in the circumstances here gets nothing while the subdivision gets all, the Courts can only say that this is not a web of their weaving, but is the result of legislative enactments. The order of the Court below as to the Murphy lands is according to law and is approved.

The Trustees contend that the Court below was without jurisdiction in that the District and the bondholders are not permitted to sue the State without its consent. We do not agree. Assuming that the Federal Government has the right through eminent domain to take lands belonging to a state, which is not questioned, this case then presents merely a proceeding in eminent domain in which is drawn into controversy the question of the distribution of the award. The State, the District, and the bondholders claim-

ed the award, and a judicial determination of the issue is appropriate to the exercise of the power of eminent domain.

The Court below was without error in its order relating to the distribution of the award for the payment of state, county, and drainage taxes on a parity basis as to lands to which the State did not have the fee simple title under the Murphy Act.

The judgment below is
AFFIRMED.

A True copy:
Teste:

(SEAL) /s/ OAKLEY F. DODD

Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.

Exhibit B

"This Act shall remain in full force and effect for two years from the date same shall become a law and at expiration of such four year period, then the fee simple title to all lands, against which there remain outstanding tax certificates which on the date this Act becomes a law, are more than two years old, shall become absolutely vested in State of Florida, and every right, title or interest of every nature or kind whatsoever of former owner of said property or anyone claiming by, through or under him, or anyone holding lien thereon shall cease, terminate and be at an end, and the State of Florida thereafter, through

the Trustees of Internal Improvement Fund shall be authorized and empowered to sell the said lands to the highest and best bidder for cash at such time and after giving such notice and according to such rules and regulations as may be fixed and adopted from time to time by the said Trustees of the Internal Improvement Fund.

"After the expiration of two years from date this Act shall become a law no court in this State, either Federal or State shall have jurisdiction to entertain any suit brought by the former owner of said land or anyone claiming by, through or under him for the purpose of questioning, or in any way litigating or contesting the title of the State of Florida, or its grantee to said land."

Section 9, Chapter 18,296, Laws
of Florida, Acts of 1937.

Exhibit C

Portion of Section 1114, RGS 1920, deemed necessary for consideration in connection with this case:

"After the lists of lands, with the assessed benefits and the decree and judgment of court, have been filed in the office of the clerk of the circuit court as provided in Section 1112, then the board of supervisors shall without any unnecessary delay, *levy a tax* of such portion of said benefits on all lands, in the district to which benefits have been assessed as may be found necessary by the board of supervisors to pay the costs of the completion of the proposed works and improvements as shown in said 'Plan of Reclamation' and in

carrying out the objects of said district, and in addition thereto ten per cent of said total amount for emergencies. The said tax shall be apportioned to and *levied on each tract of land* in said district in proportion to the benefits assessed and not in excess thereof, and in case bonds are issued as provided hereinafter, then the amount of the interest (as estimated by said board of supervisors) which will accrue on such bonds shall be included and added to the said tax, * * * " (Italics ours.)

Exhibit D

Portion of Section 1115, RGS 1920, as amended by Chapter 9129, Laws of Florida 1923, deemed necessary for consideration in connection with this case:

"Section 1115. Board to Levy Amount of Annual Installments; Certificate to Collectors.—The Board of Supervisors shall each year thereafter determine, order and levy the amount of the annual installments of the total taxes levied under the preceding section, which shall become due and be collected during said year at the same time that State and County taxes are due and collected, which said annual installment and levy shall be evidenced and certified by the said Board not later than November 1st of each year to the collector of each county in which lands and other property of said district are situated. The certificate of such installment tax shall be substantially in the following form:

STATE OF FLORIDA }
COUNTY OF..... }

This is to certify that by virtue and authority of the provisions of Article I, Chapter 3, Title 7, First Division of the Revised General Statutes of Florida, the board of supervisors of '..... Drainage District of Florida' have and do hereby levy the sum of $..... as the annual installment of tax for the year 19..... *of the total tax levied under the provisions of Section 1114* of said Article, which said total tax has heretofore been certified to the clerk of the Circuit Court of your County; * * * ". (Italics ours.)

Exhibit E

Portion of Section 1119, RGS 1920, as amended by Chapter 9129, Laws of Florida 1923, deemed necessary for consideration in connection with this case:

"Section 1119. Taxes and Costs a Lien on Land Against which Taxes Levied; Sub-Drainage Districts; Form of Certificate Asserting Lien.—All drainage taxes provided for in this Article, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee fixed by the court and taxed as costs in the action brought to enforce payment, shall, from the date of assessment thereof until paid, constitute a lien, *to which only the lien of the State for General State, County School and Road taxes shall be paramount,* upon all the lands against which such taxes shall be

levied as is provided in this Article; Provided, that if any drainage district or districts organized or established under the provisions of this article shall be within the boundaries of a district or districts theretofore established under the law of this State, the district or districts last organized and established shall be designated as sub-drainage districts, and the lien for taxes assessed or levied for the purposes of such sub-drainage districts, with the penalties for default in the payment thereof and all costs incurred, shall be subject to the prior lien for drainage taxes assessed or levied for the district or districts first established, as well as the lien for State and County taxes, and the certificate asserting such lien shall so state; PROVIDED, FURTHER, That a sale of any of the lands within a drainage district for State and County taxes shall not operate to relieve or release the lands so sold from the lien for subsequent installments or drainage taxes, which lien may be enforced as against such lands as though no such sale thereof had been made. Such lien for drainage taxes shall be evidenced by certificate substantially in the following form, to-wit:

STATE OF FLORIDA }
} ss.
COUNTY OF..... }

To.....Clerk of the
Circuit Court of said County:

This is to certify that by virtue and authority of the provisions of Article 1, Chapter 3, Title 7, First Division of the Revised General Statutes of Florida, the board of supervisors of.....Drainage District, in which are situated lands in the following counties,.....in the State of Florida, have and do hereby certify the taxes authorized by the said statute, which tax and the land against which the same are levied in your county, are described in the following table, in which table are: First, the names of the present owners of said land so far as known to the board of supervisors or the owners of said land as they appear in the decree of the Circuit Court organizing said districts; second, the descriptions of the said lands opposite the names of said owners; and third, the amount of said taxes levied on each tract of land.

(Here insert such table)

The said tax shall be payable in annual installments, the amount of each installment as well as the amount of the maintenance tax will be determined and certified to the county collector of your county not later

than the first day of November of each year. The aforesaid tax and such maintenance taxes as may be levied from time to time are hereby declared a lien, to which only the lien of the State for general State, County, School and Road taxes shall be paramount, upon all lands herein and heretofore described.

WITNESS the signature of the president of said board of supervisors, attested by the seal of the said district, and the signature of the secretary of said board, this the.....day of....., A. D. 19.....

.....
President

(SEAL).....
Secretary.

Exhibit F

Title to Act and that part of Section 2 and 4 of Chapter 12040, Laws of Florida 1927, deemed necessary for consideration in connection with this case:

"AN ACT Relating to General Drainage; to Amend Section 1114 of the Revised General Statutes of Florida; to Amend Section 1119 of the Revised General Statutes of Florida, as amended by Chapter 9129, Laws of Florida, Acts of 1923; to Amend Section 1138 of the Revised General Statutes by Chapter 9129, Laws of Florida, Acts of 1923; all of said Sections Relating to General Drainage.

* * * * *

"Section 2. That Section 1119 of the Revised General Statutes of Florida as amended by Chapter 9129,

Laws of Florida, Acts of 1923, be and the same is hereby amended to read as follows:

"Section 1119. TAXES AND COSTS A LIEN ON LAND AGAINST WHICH TAXES LEVIED; SUB-DRAINAGE DISTRICTS; FORM OF CERTIFICATE ASSERTING LIEN.—All Drainage taxes provided for in this Article, together, with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee fixed by the court and taxed as costs in the action brought to enforce payment, shall, from the date of assessment thereof until paid, constitute a lien of equal dignity with the liens for State and County taxes, and other taxes of equal dignity with State and County taxes, upon all the lands against which such taxes shall be levied as is provided in this article: * * *

"Section 4. All laws and parts of laws in conflict herewith are hereby repealed."

Exhibit G

Portion of Section 696, RGS 1920, relating to lien of State and County taxes:

" * * * All real and personal property shall be subject to taxation on the first day of January of each year, and this Chapter shall create a lien upon such property for the purposes thereof superior to all others, * * * "

Exhibit H

Chapter 10040, Laws of Florida 1925, re-enacted by Section 1, Chapter 14572, and Section 2 of Chapter 17442, Acts of 1929 and 1935:

> "All taxes imposed pursuant to the constitution and laws of this State shall be a first lien superior to all other liens on any property against which such taxes have been assessed which shall be continued in full force and effect until discharged by payment, * * * "

(12)

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IN THE
Supreme Court of the United States
October Term, 1944

No. 320

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND, et al,
PETITIONERS,
vs.
SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT, et al,
RESPONDENTS

BRIEF FOR SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

W. F. HIMES
Counsel for said Respondent.
Tampa, Florida

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IN THE
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BRIEF FOR SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

On October 9, 1939, the United States, in the exercise of its power to provide for the national defense, acquired the fee simple title to 5766.82 acres of land situate near the City of Tampa in the Southern District of Florida for an Army Air Base, through the filing in the District Court of its petition for condemnation accompanied by a declaration of taking by the Secretary of War and the deposit in the registry of the Court of the estimated compensation therefor in the amount of $173,004.60. The proceedings were had and conducted in conformity with the Act of Congress, 46 Stat. 1421, 40 U.S.C.A., 258a. The amount of compensation was determined by the verdict of a jury rendered January 23, 1942, and the

judgment entered thereon on May 29, 1942, wherein the amount of compensation was fixed separately for each of the several portions into which the whole tract was divided, designated by appraisal numbers. The judgment provided, among other things, that the compensation awarded should—

> "be disbursed by the Clerk of this Court pursuant to and in accordance with such orders as this Court shall make herein for the disbursement of the same after this Court has determined to whom the said sum of money in the registry of this Court, or any part thereof shall be disbursed for the payment of the respective awards after the payment out of said deposit of any lawful liens that the Court may determine were outstanding against each of the said several parcels of land on the date of the taking of said lands by the United States, to wit, October 9, 1939." (Tr. 101.)

The aggregate amount of the compensation so allowed for the acreage taken was $157,701.25, and so it was that the money deposited in the registry of the Court and which accompanied the declaration of taking constituted a *res in custodia legis* to provide the compensation allowed for the lands taken, which it was both the right and the duty of the District Court to award and direct paid over to whomsoever was found rightfully entitled thereto, in the doing of which the Court exercised an integral element of its jurisdiction of the proceeding in eminent domain.

A portion of the lands condemned lay within the boundaries of Southwest Tampa Storm Sewer Drainage District created under and to which were applicable the General Drainage Laws of the State of Florida originally found in Chapter 6458 of the Acts of 1913 and subsequently in Sections 1098 to 1150, Revised General Statutes, 1920, Sections 1451 to 1507, Compiled General

Laws, 1927, Sections 298.01-298.56, Florida Statutes, 1941.

The Drainage District, its Board of Supervisors and Receiver, by their original and amended answer to the Government's condemnation petition (Tr. 25, 57) and their subsequent petition for distribution (Tr. 79), asserted liens in favor of the District against certain therein described parcels of the condemned lands at the time of taking for drainage taxes, and right to payment and satisfaction thereof from the compensation awarded therefor. Such taxes were in part for the purpose of maintenance and in part to meet the principal and interest of the outstanding bonds of the District.

The Reconstruction Finance Corporation, as the holder of the greater portion of the outstanding bonds of the District and the interest in arrears thereon, by its answer to the Government's condemnation petition, alleged its ownership of said bonds, the levy of a tax for the payment of the bond issues of the District, and the levy and assessment by the District on its annual tax rolls of installments of such total tax, and that said respondent, as the owner of said bonds, held a lien against certain parcels of the condemned lands superior in dignity to all other liens except those for State and County taxes and of equal dignity therewith to the amount of such unpaid taxes, and embodied a prayer that from the compensation allowed for each such parcel of land all such unpaid drainage taxes should be deducted and paid over in reduction of the bonded indebtedness due by the Drainage District.

By answer filed on August 5, 1941, by the Trustees of the Internal Improvement Fund of the State of Florida, it was asserted that said State held title to specified

portions of the condemned land which had vested in the State pursuant to Section 9 of the Murphy Act (Chapter 18,296, Laws of Florida, Acts of 1937), and claim was made to the entire sums awarded for the taking thereof (Tr. 42). These lands were those against which there were outstanding tax sale certificates for State and County taxes two or more years old at the time of the taking effect of the Murphy Act (June 9, 1937), and not redeemed at the end of two years thereafter (June 9, 1939), at which later date the Act declared title to such lands to vest absolutely in the State of Florida.

On August 24, 1942, an amended claim was filed for unpaid State and County taxes against certain of the condemned lands the title to which had not vested in the State of Florida (Tr. 105-111).

On September 18, 1942, a decree was entered distributing and ordering payment of the compensation awarded for each of those parcels described therein, the title to which had vested in the State under the Murphy Act, which compensation was ordered applied first to the discharge of the liens therein found to exist against such tract in favor of Southwest Tampa Storm Sewer Drainage District for drainage taxes annually levied and assessed by it prior to the time of taking, and the residue to be paid to the Trustees of the Internal Improvement Fund of Florida (Tr. 115-127).

On September 18, 1942, a decree was entered distributing and ordering payment of the compensation awarded for each of those parcels described therein, the title to which had not vested in the State under the Murphy Act, which compensation as to each tract was ordered applied to the payment of the amounts for which liens thereon existed at the time of taking for

unpaid State and County taxes and drainage taxes, and where the amount of such compensation was inadequate to satisfy in full the amount of said liens that the compensation should be prorated and applied to the satisfaction of said liens without preference (Tr. 112-115). It is important to keep in mind that the claim filed for these State and County taxes disclosed that they were all levied and assessed for one or more of the years 1935 or subsequent years, and therefore that these taxes were levied and assessed *subsequently* to the enactment of Chapter 12,040, Laws of Florida, 1927, by Section 2 of which act Section 1119 of Revised General Statutes of Florida (which subsequently became Section 1472, Compiled General Laws, and Section 298.41 Florida Statutes, 1941) was amended so as to provide that drainage taxes should constitute a lien of equal dignity with the liens for State and County taxes.

The drainage taxes for which liens were allowed in these two decress of distribution were restricted to those levied and assessed upon the annual tax rolls of the District prior to the time of taking, with accrued penalties for the nonpayment thereof, — the Court having theretofore by its order of April 8, 1942, denied the District any lien for or right to payment of the unextended portion of the total tax levied for the payment of its bond issues. (Tr. 86-88). This order became and in effect was the final judgment of the District Court disallowing that portion of the Drainage District's claim. No appeal has ever been taken therefrom and therefore this ruling has never been and is not now subject to appellate review.

The two decrees of September 18, 1942, above mentioned, upon an appeal taken by the petitioners, were affirmed on May 8, 1944, by the Circuit Court of Ap-

peals for the Fifth Circuit, and it is of these two decrees that the petitioners complain and seek to obtain a review by this Court.

It is at once apparent that no one of the reasons for review enumerated in Rule 38 of this Court is present; that the questions sought to be presented are of local interest only and controlled by the laws of the State of Florida; and that the Circuit Court of Appeals found these two distribution decrees to be in conformity therewith.

ARGUMENT

The contention advanced under each of Points I, II and III in petitioners' brief is without merit.

Point I.

It is too well settled to admit now of any doubt that the United States in the exercise of one of its constitutional powers may resort to a proceeding in eminent domain to acquire lands required for its use, including lands owned by one of the States, and that no State can impose any obstacle thereto, and that a District Court of the United States has jurisdiction of such proceeding.

> *State of Okla., ex rel Phillips* v. *Guy F. Atkins Co., et al,* 313 U. S. 508, 85 L. Ed. 1487.
>
> *Kohl et al* v. *United States,* 91 U. S. 367, 23 L. Ed. 449.
>
> *State of Minn.* v. *United States,* 125 Fed. (2d) 636 (8 CCA).
>
> *United States* v. *4450.72 Acres of Land, et al,* 27 Fed. Supp. 167.

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Chappell v. *United States*, 160 U. S. 499, 40 L. Ed. 510.

29 C.J.S., page 803.

"It has not been seriously contended during the argument that the United States Government is without power to appropriate lands or other property within the States for its own uses, and to enable it to perform its proper functions. Such an authority is essential to its independent existence and perpetuity. These cannot be preserved if the obstinacy of a private person, *or if any other authority*, can prevent the acquisition of the means or instruments by which alone governmental functions can be performed. The powers vested by the Constitution in the General Government demand for their exercise the acquisition of lands in all the States. These are needed for forts, armories and arsenals, for navy yards and light-houses, for custom-houses, post-offices, and court-houses, and for other public uses. If the right to acquire property for such uses may be made a barren right by the unwillingness of property holders to sell, or by the action of a State prohibiting a sale to the Federal Government, the constitutional grants of power may be rendered nugatory, and the Government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen. This cannot be . . . . . .

" 'So far as the General Government may deem it important to appropriate lands or other property for its own purposes, and to enable it to perform its functions — as must sometimes be necessary in the case of forts, light-houses and military posts or roads, and other conveniences and necessities of government — the General Government may exercise the authority as well within the States as within the territory under its exclusive jurisdiction; and its right to do so may be supported by the same reasons which sup-

port the right in any case; that is to say, the absolute necessity that the means in the Government for performing its functions and perpetuating its existence should not be liable to be controlled or defeated by the want of consent of private parties or *of any other authority.*' . . . . . .

"If the United States have the power, it must be complete in itself. It can neither be enlarged nor diminished by a State. Nor can any State prescribe the manner in which it must be exercised. The consent of a State can never be a condition precedent to its enjoyment." (Italics ours)

Kohl et al v. *United States, supra.*

A proceeding in condemnation is in rem against the land. *State of Minnesota* v. *United States, supra.* The Statute under which the proceeding in the instant case was conducted is constitutional and satisfies all such requirements.

A.C.L. RR. Co., v. *United States,* 132 Fed. (2d) 959 (5 CCA).

United States v. *47.21 Acres of Land,* 48 Fed. Supp. 73.

United States v. *80 Acres of Land,* 26 Fed. Supp. 315.

United States v. *72 Acres of Land,* 37 Fed. Supp. 297.

Hessel v. *A. Smith & Co.,* 15 Fed. Supp. 953.

The jurisdiction of the Court extends to the making of such orders, judgments and decrees as may be necessary or appropriate for the distribution of the compensation deposited in the registry of the Court.

United States v. *53.25 Acres of Land,* 47 Fed. Supp. 887.

Where a fund is not in the hands of a State but in the hands of a court which has the right and power to award the same to those to whom it rightfully belongs, and the fund has never been disposed of in any manner by any order of the court, claims interposed thereto and the distribution thereof in accordance with the respective rights of the claimants neither involve nor constitute any suit against a State.

State v. *King, et al,* 76 W.Va. Rep. 10, 84 S.E. 902.

In *State Board of Escheats* v. *Klump, et al,* 38 Fed. (2d) 625 (6 CCA), a suit by the legal heirs of decedent against the State Board of Escheats of Michigan to recover property to which the plaintiffs were entitled but which was in the possession of such Board, was held not to constitute a suit against the State of Michigan,—it being found that such Board in fact constituted officers who held the property as Trustees under the duty to restore the same or the proceeds thereof to its rightful owners.

In the instant case, the compensation allowed for the lands taken by the United States was a *res in custodia legis* over which the jurisdiction of the Court extended with the duty of making distribution thereof to those who were made to appear rightfully entitled thereto. In the exercise of this jurisdiction, in no sense was any suit against the State of Florida involved.

If the contention advanced on behalf of petitioners were accepted, the inevitable consequence which would flow therefrom would be either (1) that the fund representing compensation must remain undistributed in the registry of the court *ad infinitum,* or (2) that the State of Florida would be entitled to a fund irrespective

of the interest which others might have therein and thereto.

Point II.

The contention insisted upon by the petitioners hereunder has been refuted by the Supreme Court of the State of Florida in *Carlile* v. *Melbourne-Tillman Drainage District, et al,* 143 Fla. 355, 196 So. 687, as follows:

> "The title which vests in the State under statute vesting in state fee-simple title to all lands certificated to state for nonpayment of taxes is subject to the lien of drainage district taxes. Acts 1937, c. 18296." (Headnote).
>
> ". . . . . .
>
> "PER CURIAM.
>
> "The only question involved in this appeal is, 'Did title to land subject to Murphy Act in Drainage District go over to the State subject to and burdened with drainage district taxes?'
>
> "Stated otherwise, the question is: Did the State of Florida take title to lands under the provisions of the Murphy Act, Acts 1937, c. 18296, free and clear of the lien created by the levy and assessment of drainage district taxes delinquent prior to title vesting in the State?
>
> "The Circuit Court in effect held that the delinquent drainage tax remained a lien against the property on which the same was levied.
>
> "The decree is affirmed on authority of the opinion and judgment of this Court in the case of Bice v. City of Haines City, 195 So. 919, filed May 17, 1940.
>
> "So ordered.
>
> "TERRELL, C.J., and WHITFIELD, BROWN, BUFORD, CHAPMAN AND THOMAS, J.J., Concur."

The Supreme Court of Florida, with equal clarity and emphasis, has held that the title which vested in the State under the provisions of the Murphy Act on June 9, 1939, was the fee simple title and thereafter continued to be the fee simple title, and the interest of the State could not be treated as a prolongation or continuation of the tax claims or tax liens which existed before and brought about the vesting in the State of the title in consequence of nonpayment thereof.

In *Prince Hall Masonic Building Association* v. *City of Jacksonville,* 149 Fla. 109, 6 So. (2d) 250, it was declared and held by the majority of the Court as follows:

> "The effect of Chapter 18,296, effective June 9, 1937, is to *vest* in the State of Florida on *June 9, 1939*, 'the fee simple title' to all lands, against which there remains outstanding State tax certificates held by the State that on *June 9, 1937, were more than two years old,* discharged of any right of redemption, thereby merging the State's tax liens into a legal title without a right of redemption."
>
> (On rehearing, by Justice Whitfield, pages 255-6).

Point III.

The contention hereunder advanced by the petitioners is untenable. By Statute in force at the time the United States took title to the condemned lands (Sec. 1472 Compiled General Laws, subsequently Sec. 298.41 Florida Statutes, 1941), which was enacted by Section 2 of Chapter 12,040, Laws of Florida, 1927, drainage taxes were constituted a lien of equal dignity with the liens for State and County taxes. As heretofore pointed out, the unpaid State and County taxes against the lands involved in the distribution decree were levied and

assessed for one or more of the years 1935 or subsequent years and therefore subsequently to the enactment last referred to.

The effectiveness of such legislation has been recognized by the Supreme Court of Florida in *State ex rel Campbell* v. *Sloan,* 135 Fla. 179, 184 So. 781, wherein, referring to liens for State and County taxes and liens for drainage taxes, it was said:

> "Each of the liens is made by law of equal dignity."

and in *Ideal Farms Drainage District, et al,* v. *Certain Lands,* unreported, in the opinion upon rehearing filed August 1, 1944, Section 298.41, Florida Statutes, 1941, was approvingly quoted and given effect.

The District Court, in denying the Drainage District a lien at the time of taking for that portion of the total tax levied for the payment of its bond issues which had not previously to condemnation been levied and assessed upon its annual tax rolls, followed the holding of the Supreme Court of the State of Missouri in *McAnally* v. *Little River Drainage District, et al,* 325 Mo. 348, 28 S.W. (2d) 650. The General Drainage Law enacted in Florida by Chapter 6458 of the Acts of 1913, is very nearly the same as the law enacted in the State of Missouri, found in Missouri R. S. 1919, Sec. 4378, et seq. In the case last cited, it was held that a lien did not exist and accrue in favor of the District for drainage taxes until such time as an annual assessment was determined upon and levied. The provisions of the Missouri statute and those of the Florida law are so similar and the case last cited so persuasive that a quotation at length from that opinion is included in the appendix hereto, where we have inserted in brackets the section of the Florida law

corresponding to that of the Missouri statute referred to in the opinion.

CONCLUSION

Respondent opposes the issuance of the writ applied for on the ground that no adequate and sufficient reason for the allowance thereof is made to appear, and that the judgment of which review is sought was and is manifestly correct.

Respectfully submitted,

W. F. HIMES

Counsel for said Respondent.

APPENDIX

Quotation from *McAnally* v. *Little River Drainage District, et al,* 325 Mo. 348, 28 S. W. (2d) 650:—

"The question involves the construction of sections of the statute authorizing the organization of drainage districts by circuit courts. Reference to sections will be understood to mean R. S. 1919.

"The financial foundation of the district is provided in section 4394, which follows:

" 'After the list of lands and other property, with the assessed benefits and the decree and judgment of court, have been filed in the office of the county recorder as provided in section 4392 of this article, then the board of supervisors shall, without any unnecessary delay, levy a tax of such portion of said benefits on all lands, railroad and other property in the district to which benefits have been assessed, as may be found necessary by the board of supervisors to pay the costs of the completion of the proposed works and improvements as shown in said 'plan of reclamation' and in carrying out the objects of said district, and plus ten per cent of said total amount for emergencies. The said tax shall be apportioned to and levied on each tract of land or other property in said district in proportion to the benefits assessed and not in excess thereof, and in case bonds are issued as provided herein and hereafter, then the amount of the interest (as estimated by said board of supervisors) which will accrue on such bonds shall be included and added to the said tax, but the interest to accrue on account of the issuing of said bonds shall not be construed as a part of the costs of construction in determining whether or not the expenses and costs of making said improvements are or are not equal

to or in excess of the benefits assessed. The secretary of the board of supervisors, as soon as said total tax is levied, shall, at the expense of the district, prepare a list of all taxes levied, in the form of a well bound book, which shall be indorsed and named 'drainage tax record of ..... drainage district .....', which indorsement shall also be printed or written at the top of each page in said book, and shall be signed and certified by the president and secretary of the board of supervisors, attested by the seal of the district, and the same shall thereafter become a permanent record in the office of said secretary.'

> [This section is identical with Section 17 of Chapter 6458, Florida Acts, 1913; Section 1114 Revised General Statutes, 1920; Section 1467 Compiled General Laws, 1927; Section 298.36 Florida Statutes, 1941, insofar as pertinent to liens in favor of the District and the accrual thereof.]

"In Elsberry Drainage District v. Winkelmeyer, 278 Mo. 268, 212 S. W. 893, we held the levy under this section was not self-enforcing and that it was only 'a step necessarily precedent' to the levy and collection of the district taxes.

"This levy rests on the engineers' estimate of the cost of reclaiming the land and is only an estimate of the taxes to be collected. If found to be insufficient, it may be increased within the amount assessed as benefits. Section 4418.

> [This section, except for variations of no material bearing upon the question now under consideration, is the same as Section 41, Chapter 6458, Acts of 1913; Section 1138 Revised General Statutes, 1920; Section 1493, Compiled General Laws, 1927.]

It is made before the construction contracts are let, before bonds are issued, and is only notice to the owners of land within the district and to all that said lands are subject to taxation for purposes of the district. If the undertaking should collapse before an annual levy, no taxes may be collected.

"In determining the question, the above section should be considered with section 4395, which in part follows:

" 'The said board of supervisors shall each year thereafter determine, order and levy the amount of the annual installment of the total taxes levied under the preceding section, which shall become due and be collected during said year at the same time that state and county taxes are due and collected, which said annual installment and levy shall be evidenced and certified by the said board not later than September 1st of each year to the collector of revenue of each county in which lands and other property of said district are situate. * * *'

> [The same language is in the Florida law, Section 18, Chapter 6458, Acts of 1913; Section 1115 Revised General Statutes, 1920; Section 1468, Compiled General Laws, 1927; Section 298.37 Florida Statutes, 1941.]

"The lien of the state for taxes is established by an assessment of all land for that purpose. Section 12757. However, said lien does not accrue and become a fixed encumbrance until the amount of the tax is determined by an annual assessment of the land and annual levy of the tax. Likewise, the lien of a drainage district annually accrues and become a fixed incumbrance at the time the board of supervisors 'determine, order and levy the amount of the annual installment of the total taxes levied under' section 4395. The intention of the Legis-

lature could not have been otherwise, for, as argued by respondents: 'Can a lien exist until the amount of the charge has been determined? Can a charge be cancelled until it has been created? Can a sale of land in 1926 destroy a tax not to be determined and levied until in 1928? Can anything be destroyed prior to its creation? A landowner cannot pay the annual tax until after it has been determined, ordered and levied and certified to the Collector. How can it be contended that it is a lien until the owner of the property charged had an opportunity to discharge the so-called lien?"

"Answering this, appellant directs attention to section 4399, which follows:

" 'All drainage taxes provided for in this article, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee, to be fixed by the court and taxed as costs in the action brought to enforce payment, shall, from date of filing the certificate hereinafter described in the office of the recorder of deeds for the county wherein the lands and properties are situate, until paid, constitute a lien, to which only the lien of the state for general state, county, school and road taxes shall be paramount, upon all the lands and other property against which such taxes shall be levied as is provided in this article. Such lien shall be evidenced by a certificate substantially in the following form, to wit:' [Then follows the form of the certificate.]

[The corresponding provisions in the Florida law are to be found in Section 22, Chapter 6458, Acts of 1913; Section 1119, Revised General Statutes, 1920; Section 1472, Compiled General Laws, 1927; and Section 298.41, Florida Statutes, 1941.]

"Under this section when an annual installment tax (section 4395) and an annual maintenance tax (section 4419)

> [Corresponding provisions in the Florida law are to be found in Section 42 of Chapter 6458, Acts of 1913; Section 1139, Revised General Statutes, 1920; Section 1496, Compiled General Laws, 1927; Section 298.54, Florida Statutes, 1941. The variations therein found are not material to the case now under consideration.]

are levied, the liens attach as of the date of filing the certificate of levy of the estimated total tax (Section 4394) in the office of the recorder of deeds. But the lien does not accrue until an annual levy is made. It follows that at the time appellant purchased the land, the owner held title free of, but subject to, the lien of future installments of the estimated total tax."

Excerpt from Sec. 2, Chapter 12,040, Laws of Florida, Acts of 1927, later Section 1472 Compiled General Laws of 1927, Sec. 298.41 Florida Statutes, 1941:—

"All drainage taxes provided for in this Article (Chapter), together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee fixed by the court and taxed as costs in the action brought to enforce payment, shall, from the date of assessment thereof until paid, constitute a lien of equal dignity with the liens for State and County taxes, and other taxes of equal dignity with State and County taxes, upon all the lands against which such taxes shall be levied as is provided in this Article (Chapter) . . . . . ."

FILED
SEP 30 1944
CHARLES ELMORE CROPLEY
CLERK

No. 320

In the Supreme Court of the United States

OCTOBER TERM, 1944

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA, AND THE STATE OF FLORIDA, ET AL., PETITIONERS

v.

SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT AND RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 320

TRUSTEES OF THE INTERNAL IMPROVEMENT FUND OF THE STATE OF FLORIDA, AND THE STATE OF FLORIDA, ET AL., PETITIONERS

v.

SOUTHWEST TAMPA STORM SEWER DRAINAGE DISTRICT, AND RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The orders of the district court appear at R. 91, 112–127. The opinion of the circuit court of appeals (R. 149) is reported in 142 F. (2d) 637.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 8, 1944 (R. 149). The petition for a writ of certiorari was filed on August

14, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the principle of sovereign immunity from suit bars an award to a drainage district for its tax claims on lands owned by the State of Florida in a proceeding brought by the United States to condemn those lands.

2. Whether the tax liens of a drainage district on lands fee simple title to which passed to the State under Florida's so-called Murphy Act of 1937 were extinguished under Florida law.

3. Whether, under Florida law, the tax liens of a drainage district are subordinate to liens for state and county taxes, assessed after 1927, on the same land.

STATUTES INVOLVED

The relevant statutory provisions are set forth in the Appendix, *infra,* pp. 13–14.

STATEMENT

On October 9, 1939, the United States filed a declaration of taking and a petition for condemnation of 5,766.82 acres of land to be used as the site for an Army air base in the County of Hillsborough in the State of Florida (R. 8–15). On November 10, 1939, the district court "ordered and adjudged" that the title to the land was vested in the United States after the latter had deposited in the registry of the court a sum estimated to be

just compensation for the land taken (R. 16–18). In response to the petition of the United States, the Southwest Tampa Storm Sewer Drainage District, hereinafter called the Drainage District (R. 25), the Reconstruction Finance Corporation (R. 19), the State of Florida (R. 23), the County of Hillsborough (R. 23), and the Board of Trustees of the Internal Improvement Fund of the State of Florida (R. 42), filed answers, each claiming a portion of the award to be made at the conclusion of the condemnation proceedings. On January 31, 1942, the jury determined the fair market value of each parcel or tract of land involved in this proceeding, the total award being $157,701.25 (R. 102).

The facts which underlie the consequent dispute as to the disposition of this fund are as follows: A large part of the lands taken by the United States were within the boundaries of the Drainage District, which was established in 1923 (R. 26–27). On October 16, 1924 (R. 31), and again on June 1, 1926 (R. 38), the Board of Supervisors of the Drainage District resolved that a tax be levied on all lands in the district to which benefits had been assessed (R. 31, 38), and shortly thereafter made provision for the "annual levy and collection in installments of the total taxes levied" (R. 32–33, 40). In addition, the Drainage District, in each year from 1925 to 1939, 1928, 1935, and 1936 excluded, levied a maintenance tax on each tract of

land within the district (R. 34). The Drainage District claimed that the annual installments and maintenance taxes remained unpaid in part, and that penalties had attached to the delinquent taxes (R. 34, 40). In order to retire some of the matured bonds issued by the Drainage District (R. 58), the court was asked to award to the District the unpaid installment and maintenance taxes and penalties, as listed, out of the proceeds contributed by the United States for the taking of the land (R. 61). The answer of the Reconstruction Finance Corporation alleged that it was the owner and holder of almost all of the bonds issued by the Drainage District (R. 20), that the taxes here involved were the District's only means of paying its bonded indebtedness (R. 22), and prayed that "from the amount found as a reasonable value on each piece, parcel, lot or tract of land involved in this suit * * * the unpaid total tax secured by lien thereon be deducted from the value fixed on said land and paid over to this respondent to be applied by it in reduction of the indebtedness due it by the Southwest Tampa Storm Sewer Drainage District" (R. 22–23).

Petitioners, the State of Florida and the Board of Trustees of the Internal Improvement Fund, as agent of the State, claimed that a portion of the lands condemned belonged to the State of Florida, that these lands, on which there had been outstanding tax certificates, based on assessments

made as early as 1894 (R. 43–54), had been acquired by the State under the Murphy Act (Chap. 18296, Laws of Florida, 1937, Sec. 9) (see Appendix, *infra*, pp. 13–14), and that the State was entitled to the entire sums awarded for the taking of these lands (R. 42–43, 68).[1]

As to lands title to which was not in the State, the tax-collecting officials of Florida and Hillsborough County, also petitioners here, asserted that liens for state and county taxes (R. 63) were superior to liens for installment taxes and liens for maintenance taxes levied by the Drainage District before June 6, 1927, the effective date of Chapter 12040, Laws of Florida, 1927 (R. 69—see Appendix, *infra*, p. 14). Only maintenance taxes levied after the effective date of Chapter 12040, these petitioners urged, gave rise to a "lien of equal dignity with the liens for State and County taxes" (R. 65).

The district court ruled that the vesting of title in the Trustees of the Internal Improvement Fund under the Murphy Act of 1937 extinguished liens for state and county taxes, that these lands were subject to all unpaid drainage taxes, and that "the proceeds contributed by the United States for the taking of said lands should, as to each parcel, be

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[1] The State and its Trustees did concede that maintenance taxes levied after 1927 gave rise to liens which were of equal dignity with state and county tax liens and that the Drainage District might participate to this extent in the award (R. 69–70).

applied to the payment of the unpaid drainage taxes against such parcel" (R. 91). As to liens of the Drainage District on lands not owned by the State of Florida, and liens for state and county taxes, none of which were for 1927 or any earlier year (R. 92, 105–111, 113), the court held that they were "of equal dignity and neither is entitled to priority of payment over the other" and "that the proceeds be applied to the payment of the unpaid State and County taxes and unpaid drainage taxes pro rata and without preference, one over the other" (R. 92). In conformity with this view, the district court ordered that the award for lands, title to which was not held by the State, should be apportioned so that $878.99 should be payable for state and county taxes, and $2,571.01 should be payable for drainage taxes (R. 115). As to the lands owned by the State, it was provided that $17,297.97 be payable to the Drainage District, and that the remainder, $11,700.53, be payable to the Trustees of the Internal Improvement Fund (R. 127).

All of the petitioners appealed to the Circuit Court of Appeals for the Fifth Circuit, and that court affirmed, in its entirety, the order of the district court (R. 149).

ARGUMENT

1. Given the power of the United States to condemn state-owned land (*Oklahoma ex rel. Phillips* v. *Atkinson Co.*, 313 U. S. 508, 534–535), accept-

ance of petitioners' contention, that the district court was barred by the principle of sovereign immunity from satisfying the lien of the Drainage District out of the funds paid by the United States for the condemned land, would mean that in any such proceeding against state-owned land the United States could not secure title, free and clear, where persons other than the State had any claim on the land. The federal statute under which this proceeding was instituted (Sec. 1, 46 Stat. 1421, 40 U. S. C. 258a, Appendix, *infra*, p. 13) provides that "the court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable." To sustain the contention of petitioners it would be necessary to hold that the district court, having properly taken and exercised jurisdiction in this eminent domain proceeding brought by the United States, is without authority to determine who is entitled to the money awarded and to distribute the money to those found entitled to receive it.

The prior decisions of this Court make it clear that no such result is required. In *Clark* v. *Barnard,* 108 U. S. 436, a railroad company deposited a loan certificate for $100,000 with the Treasurer of the State of Rhode Island, as security for the payment of a bond. Upon the bankruptcy of the railroad, the assignees in bankruptcy filed a bill in equity to restrain the State Treasurer from col-

lecting the certificate. In the ensuing proceedings, the money was paid into the bankruptcy court and the State appeared to claim it. This Court held that the voluntary appearance of the State to claim the fund in controversy made it "necessary to adjudicate the adverse rights of the State and the appellees to the fund, to which both claimed title" (p. 448), and that the Eleventh Amendment did not bar such adjudication. Similarly, Florida having entered into this proceeding to claim the award for its lands, cannot now raise the defense of sovereign immunity so as to deprive the district court of the right to decide whether the Drainage District is properly entitled to a portion of the award. "If the State chooses to come into the court as plaintiff, or to intervene, seeking the enforcement of liens or claims, the State may be permitted to do so, and in that event its rights will receive the same consideration as those of other parties in interest." *Missouri* v. *Fiske,* 290 U. S. 18, 28. And in *United States* v. *Bank of New York Co.,* 296 U. S. 463, this Court held that where the United States claimed certain funds which had been deposited with the Superintendent of Insurance of the State of New York, and which were being administered by him under the direction of a state court, the United States should present its claim in the state proceedings. Mr. Chief Justice Hughes, speaking for the Court, said that "In intervening for the presentation of

its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant. We cannot see that there would be impairment of any rights the United States may possess, or any sacrifice of its proper dignity as a sovereign, if it prosecuted its claim in the appropriate forum where the funds are held" (pp. 480–481). In so ruling this Court contemplated that the state court would be empowered to decide the rights of the United States and the adverse claimants to the fund (p. 480).

2. The circuit court of appeals, despite petitioners' contention to the contrary, held that "Under the decisions of the Florida Supreme Court, which are binding on us, the drainage taxes remained a lien, but the tax liens of the State, having merged into its legal title, were no longer a lien or an encumbrance on the title of the United States." (R. 151–152.) The Murphy Act of 1937 provided for the vestiture in the State of title to all lands against which there remained outstanding tax certificates which were more than two years old (see Appendix, *infra*, pp. 13–14). In *Bice* v. *City of Haines*, 142 Fla. 371, 385, the Supreme Court of Florida held that the provision in Section 9 of the Murphy Act that "every right, title or interest of every nature or kind whatsoever of former owner of said property or anyone claiming by, through or under him, or anyone holding lien thereon shall cease, terminate and be

at an end" had reference only to private liens and, in that case, not to municipal tax liens. The Florida Supreme Court, in *Prince Hall Masonic Building Ass'n* v. *Jacksonville,* 149 Fla. 109, 122, held that under the Murphy Act, tax liens of the State merged into the fee simple title acquired by the State, and, finally, in the decision primarily relied on by the court below, *Carlile* v. *Melbourne-Tillman Drainage Dist.,* 143 Fla. 355, the Florida Supreme Court held that lands, title to which was acquired by the State under the Murphy Act, remain subject to liens for drainage district taxes. This decision in the *Carlile* case completely disposes of petitioners' contentions, for although the court in that case did not state whether the lien for drainage taxes there involved had been on a parity with or subordinate to the liens for state and county taxes before title vested in the State (*infra,* pp. 11–12), the court below was justified in deciding that it was unnecessary to give any consideration to the time when the liens for state and county taxes were asssessed or became delinquent since the state court, in the *Carlile* case, had pointed toward no such distinction. The decision in *Sugar Bowl Drainage District* v. *Miller,* 120 Fla. 436, decided five years before the *Carlile* case, did not concern the Murphy Act or the effect of any vesting of title in the State, but dealt with rights of private holders of tax certificates, and is therefore not apposite.

If there were any doubt as to the status of drainage liens which attached to lands on which there were state and county tax liens before the Act of 1927 (see Appendix, *infra*, p. 14) which granted "equal dignity" to drainage liens, we submit that, in the absence of further clarification by the Florida courts, this Court should not be called upon to substitute its judgment for that of the federal judges in the district and circuit embracing Florida. *MacGregor* v. *State Mutual Life Assurance Co.*, 315 U. S. 280.

3. Petitioners' final contention is that the liens of the Drainage District on lands not acquired by the State under the Murphy Act, except those based on maintenance taxes assessed after 1927 (see *supra*, p. 5), are subordinate to liens for state and county taxes. This contention can be readily disposed of by reference to the decision of the Florida Supreme Court in *Baldwin Drainage District* v. *Macclenny Turpentine Co.*, 18 S. (2d) 792. It was there held that where certificates for state taxes were acquired after the enactment of Chap. 12040, Laws of Florida, 1927, Sec. 1119 (see Appendix, *infra*, p. 14), providing that drainage taxes should "constitute a lien of equal dignity with the liens for State and County taxes * * *," the drainage taxes were of equal dignity with state and county taxes no matter when the former were assessed. See also *Ideal Farmers Drainage Dist.* v. *Certain Lands in Said*

District & Mountz, Fla. Sup. Ct., August 1, 1944 (a copy of the opinion in this case is lodged with the Clerk). In the present case, the state and county taxes on lands whose title did not vest in the State under the Murphy Act were all assessed after 1927 (R. 92, 105–111, 113), the effective date of the statute giving equal dignity to drainage tax liens.

CONCLUSION

The decision of the circuit court of appeals is correct and there is no conflict of decisions. The rulings of the circuit court of appeals and the district court on the questions of Florida law do not conflict in any way with the applicable local decisions. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1944.

APPENDIX

The Act of February 26, 1931, c. 307, Sec. 1, 46 Stat. 1421, 40 U. S. C. 258a, provides in part:

> Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; * * *
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> * * * * *
>
> Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Chap. 18296, Laws of Florida, 1937, Sec. 9 provides:

> SECTION 9. This Act shall remain in full force and effect for two years from the date same shall become a law and at expiration of such four year period, then the fee simple title to all lands, against which there remains outstanding tax certificates which on the date this Act becomes a law, are more than two years old, shall become absolutely vested in State of Florida, and every right,

> title or interest of every nature or kind whatsoever of former owner of said property or anyone claiming by, through or under him, or anyone holding lien thereon shall cease, terminate and be at an end, and the State of Florida thereafter, through the Trustees of Internal Improvement Fund shall be authorized and empowered to sell the said lands to the highest and best bidder for cash at such time and after giving such notice and according to such rules and regulations as may be fixed and adopted from time to time by the said Trustees of the Internal Improvement Fund.
>
> After the expiration of two years from date this Act shall become a law no court in this State, either Federal or State shall have jurisdiction to entertain any suit brought by the former owner of said land or anyone claiming by, through or under him for the purpose of questioning, or in any way litigating or contesting the title of the State of Florida, or its grantee to said land.

Chap. 12040, Laws of Florida, 1927, Sec. 1119 provides in part:

> All Drainage taxes provided for in this Article, together with all penalties for default in payment of the same, all costs in collecting the same, including a reasonable attorney's fee fixed by the court and taxed as costs in the action brought to enforce payment, shall, from the date of assessment thereof until paid, constitute a lien of equal dignity with the liens for State and County taxes, and other taxes of equal dignity with State and County taxes, upon all the lands against which such taxes shall be levied as is provided in this article * * *.

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